SUPREME COURT, U. S.

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DEC 4 1964
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. 737

CHARLES E. CRAIG ——— *Petitioner*

v.

UNITED STATES OF AMERICA ——— *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
AND
APPENDICES

JACK HOLT, JR.
115 North State
Little Rock, Arkansas

Counsel for Petitioner

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
Opinion	2
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the Writ	5
Conclusion	7
Appendix A — Statutes	8
B — Opinions and Judgments below	9-15

CITATIONS

Cases:

Kotteakos *v.* United States, 328 U.S. 750, 764-65	6
Masciale *v.* United States, 356 U.S. 386	5
Sherman *v.* United States, 356 U.S. 369	5

Statutes:

26 U.S.C.A.

Section 4704(a)	8
Section 4705(a)	8

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The Petitioner, Charles E. Craig, by his counsel, Jack Holt, Jr., petitions this Court and prays that a writ of certiorari issue to review the Judgment of the Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the Eastern District of Arkansas in which the petitioner was convicted for selling and dispensing drugs in a package without appropriate tax stamps and for selling a certain narcotic drug not pursuant to a written order.

CITATIONS TO OPINIONS BELOW

The findings of the District Court, which were not reduced to formal opinion, were affirmed by the decision of the Court of Appeals for the Eighth Circuit (Appendix B, infra, p. 9) which has not been reported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on October 14, 1964. (Appendix B, infra, p. 15.) A petition for rehearing was timely filed by petitioner and was subsequently denied on November 5, 1964.

A motion for stay of mandate pending this application for writ of certiorari was then presented to the Circuit Court of Appeals and was granted on November 12, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Should the trial court have ruled on the questions of entrapment as a matter of law.

(2) Did hearsay, prejudicial evidence and erroneous remarks of the Assistant District Attorney in closing argument substantially affect the rights of the petitioner.

(3) Was the petitioner entitled to an instruction on his affirmative defense of custodial possession and return of narcotic drugs.

STATUTE INVOLVED

The statutory provisions are 26 U.S.C.A., Section 4704A; 26 U.S.C.A., Section 4705A. (Appendix A, infra p. 8.)

STATEMENT

The petitioner was convicted in the District Court of the Eastern District of Arkansas on two (2) counts; Count I for selling and dispensing drugs in a package without tax stamps; and Count II for selling a certain narcotic drug not pursuant to a written order.

The jurisdiction of the District Court was invoked because the case arises under 26 U.S.C.A., Section 4704A, and 26 U.S.C.A., Section 4705A.

The circumstances of the crimes charged and resulting trial are set out briefly in the following particulars:

Burris, a paid informant gained an introduction to petitioner, then invited petitioner to join him and another individual, Moore, in a trip to Mississippi to obtain prescriptions for certain narcotic drugs and drugs.

Petitioner, upon request, gave informant Burris $500.00. Burris, Moore, and Petitioner drove to Mississippi. Upon arrival at their destination, Moore went into a doctor's home and procured a prescription, which was later filled. The next day, the petitioner went with Burris and Moore to another town in Mississippi where Moore obtained another prescription which was filled.

The informant Burris and Moore had been to Mississippi previously on two other drug hauls. The petitioner had not.

Burris, Moore and the petitioner then returned to Little Rock. Petitioner was disturbed as he had given informant Burris $500.00, yet had not been introduced to a source of drugs as a result of his travel.

Appellant then insisted that Burris leave one of the drugs procured as security for the money he had advanced. Burris agreed, gave the drugs to Petitioner and then caught an airplane for Hot Springs.

Approximately two hours later Burris returned to Little Rock and called Petitioner, stating that he had a friend, a safeman named Gaines, who needed 20 to 30 tablets for a sick whore friend. Gaines was later identified as Agent Snokhaus, Bureau of Narcotics.

Although petitioner told Burris not to bring his friend to his house, Burris and Agent Snokhaus went to the petitioner's home where Snokhaus attempted to bargain with the petitioner.

The petitioner states that he refused to sell any tablets, and that after insistence, he gave Burris 10 tablets provided Burris would replace them the next day, then refused payment.

Agent Snokhaus contends that he asked petitioner how much he wanted for them. The petitioner stated that they could straighten it up the next day. Snokhaus then replied that he was leaving town, then Appellant stated that twenty dollars would be a good price, which Snokhaus paid and then left.

Agent Snokhaus made two other attempts to buy drugs from petitioner, without success. Six months later petitioner was arrested.

During the course of trial the Assistant District Attorney introduced on several occasions vivid testimony of the petitioner's use and injections of drug, which were not in issue, then in closing argument, made an oration to the effect that the petitioner is not being tried for the crimes he committed in Mississippi.

At the conclusion of trial, the petitioner requested an instruction on his affirmative defense, a return rather than sale of drugs, which the Court refused.

Petitioner perfected an appeal, but on review the Circuit Court of Appeals affirmed the findings of the lower court concluding that entrapment as a matter of law should not be considered since the issue had not been raised in trial court; that the errors and inadvertent reference to appellant's use of narcotics did not have a substantial effect upon the jury verdict, and that the petitioner's contention that the informant Burris or Moore had some title or interest in the narcotics in the defendant's possession does not constitute a defense to the charges here made, and that the trial court properly refused to give Petitioner's instruction.

REASONS FOR GRANTING THE WRIT

(1) The strict decision of the Court of Appeals that the question of entrapment as a matter of law cannot be urged on appeal where such issue has not been raised in trial court denies the petitioner due process of law. The defense of entrapment, its meaning, purpose and application are problems encapable of determination by jury and should be properly viewed and ruled upon by the Court itself.

Although this Court, in the case of *Sherman* v. *United States*, 356 U.S. 369, and in *Masciale* v. *United States*, 356 U.S. 386, held that the issue of entrapment is a jury question, the Court should, in accordance with the views expressed in the concurring opinion in the Sherman case and dissent in the Masciale case, reconsider whether or not the Court should, itself, have ruled on the issue of entrapment and not left it for determination by the jury.

(2) The decision of the Circuit Court of Appeals is believed to be erroneous and conflicting with the prejudicial error test laid down in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65.

It is particularly noted that the Circuit Court of Appeals apparently did not consider the erroneous and prejudicial statement of the United States Attorney in his closing argument.

Clearly, the factual question presented concerning the prejudicial evidence is of importance in the administration of justice and the rights of the accused petitioner.

(3) The rationale of the court below on the petitioner's right to an affirmative defense of possession of drugs for or on behalf of another is not supported by any decision of this Court and is void of support in either fact or logic.

Under the statutes in question, the pertinent criminal act of the Petitioner is whether or not the Petitioner did "purchase, sell, dispense or distribute certain narcotic drugs."

It is a general rule of law that criminal case instructions are erroneous if they exclude from the jury's consideration an affirmative defense as to which evidence has been received.

In this instance, evidence was received concerning the Petitioner's affirmative defense of possession for another and return, thus giving rise to an issue as to whether or not a return or partial return of drugs constituted selling, dispensing, or distributing drugs.

Thus, the failure to instruct on possession and return excluded from the jury the Petitioner's defense.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACK HOLT, JR.
115 North State
Little Rock, Arkansas

Counsel for Petitioner

APPENDIX A

STATUTES

26 U.S.C.A. 4704 (a).

> *General Requirement.* — It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession the same may be found.

26 U.S.C.A. 4705 (a).

> *General Requirement.* — It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance to a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that person by the Secretary or his delegate.

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,554.
Charles E. Craig, Appellant,

v.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[October 14, 1964.]

Before VAN OOSTERHOUT and MEHAFFY, Circuit Judges, and DELEHANT, District Judge.

VAN OOSTERHOUT, Circuit Judge.

Defendant Charles E. Craig appeals from his conviction upon each court of a two count indictment. Court I charges selling and dispensing narcotic drugs in or from a package not having appropriate tax stamp in violation of 26 U.S.C.A. § 4704(a). Count II charges selling the same drugs not in pursuance to a written order on a prescribed form in violation of 26 U.S.C.A. § 4705(a). Defendant was tried to a jury and found guilty on both counts. He was sentenced to five years imprisonment on Count II and two years imprisonment on Count I, said sentences to be served concurrently.

Defendant urges that he is entitled to reversal for the following reasons:

1. The defense of entrapment was established as a matter of law.

2. Prejudicial error in admitting hearsay evidence and other evidence.

3. Refusal to give requested instruction "A".

We deem it unnecessary to set forth the evidence in detail. While defendant's testimony conflicts with that of the Government witnesses in some respects, defendant does not challenge the sufficiency of the evidence to support his conviction upon both counts except with respect to the entrapment issue.

The short answer to defendant's contention that he is entitled to a reversal because he has established entrapment as a matter of law is that defendant did not raise such issue in the trial court. Defendant made no motion for acquittal upon this or any other ground. It is firmly established that the sufficiency of the evidence to support a conviction cannot be urged upon appeal where such issue has not been raised in the trial court. *Grant* v. *United States,* 9 Cir., 291 F. 2d 746, 748; *Middleton* v. *United States,* 4 Cir., 249 F. 2d 719, 720; *Wayne* v. *United States,* 8 Cir., 138 F. 2d 1, 2.

While an appellate court has a right to note plain error under criminal rule 52(b), such right should be exercised only in exceptional cases to avoid a clear miscarriage of justice. We find here no basis for invoking the plain error rule. We have examined the record and are satisfied that a fact issue was presented on the entrapment defense and that such issue was fairly submitted to the

jury upon proper instruction to which no exceptions were taken. Under such circumstances, "the jury's verdict of guilty is completely dispositive of the asserted defense." *Vineyard* v. *United States*, 8 Cir., 335 F. 2d 176, 183.

Defendant's contention that prejudicial errors were committed in the reception of certain evidence from Mr. Burris, the Government informer, is without merit. Burris testified in substance that he had been informer by a Mr. Clift that defendant was in the market for narcotics. This testimony was stricken on defendant's motion as hearsay and the jury was instructed immediately that such testimony should be disregarded. A motion for mistrial was denied. Moreover, defendant's testimony as a witness shows without question that he was in the market for narcotics. It is unlikely that the hearsay evidence which was promptly stricken had any effect upon the jury's verdict.

Defendant also urges that testimony by the informer to the effect that he saw the defendant take narcotic injections on several occasions was improperly admitted. Most of this testimony was received without objection. Some was brought out by examination by defendant's counsel. This evidence appears to be relevant on the entrapment issue. See *Neill* v. *United States*, 8 Cir., 225 F. 2d 174. After some such testimony had been received, defendant's counsel stated that his client was not being tried for taking a shot. The United States Attorney then stated the defense counsel opened the inquiry, whereupon the court stated:

> "Well, he said he took two shots. How he took them, I think is immaterial. The Jury understands I am sure. If not, I'll tell them. He is not charged with taking dope. He is charged with selling dope."

The United States Attorney offered a proper instruction limiting the effect of the evidence of other offenses. Defendant objected to the giving of such instruction and requested no limiting instruction.

We recently had occasion in *Evenson* v. *United States*, 8 Cir., 316 F. 2d 94, to collect the pertinent authorities to be applied with respect to determining whether prejudicial error has been committed in the reception of evidence. In that case, we held that when the prejudicial error test laid down in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, was applied, we found no prejudicial error, stating:

> "When consideration is given to the strong case made out by the Government, the rather brief, unemphasized reference to appellant's admission of his past record, the prompt and decisive action of the trial court in striking the evidence, and instructing the jury to disregard it, the trial court's appraisal to the effect upon the jury as reflected by his denial of the mistrial motion, and the record as a whole, we feel that we can say with reasonable assurance that the apparently inadvertent reference to appellant's past record did not have any substantial effect upon the jury's verdict." 316 F. 2d 94, 96.

What we said in *Evenson* fully applies to the errors here asserted.

Defendant as a witness admitted that he had made a trip from Little Rock, Arkansas, to Greenville and Marks, Mississippi, accompanied by Burris and George Moore, for the purpose of obtaining narcotics by means of doctor's prescription and for the purpose of making the acquaintance of doctors who would issue such prescrip-

tions. Defendant furnished $400 to finance the trip and purchases and the parties were successful in obtaining narcotics by means of prescription. Defendant did not participate in seeing the doctor and obtaining the prescription. He admits that he obtained possession of about seventy Dilaudide tablets. Ten of such tablets were involved in the sale charged in the indictment. Defendant sets out his version of the acquisition of possession of the narcotics as follows:

> "I said 'Well, let me hold that stuff that you got there for security. I ain't got no money, no medicine, no nothing. I better have something'. He said 'Well, I'll let you hold this dilaudide here, I've got a man who wants this other'. — I can't think of the name of him, anyway he said he had a man that wanted that, he said he would let me hold the dilaudide, so I had it."

Upon the basis of such testimony, defendant requested instruction "A" which in substance was designed to advise the jury that if defendant was holding the narcotics for another person and subsequently returned the narcotics to such person, he was not guilty of the offenses charged.

The indictment charges the defendant with unlawful sale to Snokhous. The court properly charged the jury with respect to the offenses charged. If, as defendant contends, the informer or Moore had some title or interest in the narcotics in the defendant's possession which defendant sold to Snokhous, such would not constitute a defense to the charges here made. The court properly refused to give the instruction.

Graham v. United States, 6 Cir., 257 F. 2d 724, is of no aid to the defendant. Said case is distinguishable in many respects. Among other things, the defendant there contended that he had no knowledge of the contents of the package left with him for safekeeping. The charge there was based on possession, not on sale as here.

We have fully considered all errors urged by the defendant. Our examination of the record convinces us that no prejudicial errors were committed by the trial court and that the defendant has had a fair trial.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.
Filed Oct. 14, 1964, Robert Tucker, Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,554. September Term, 1964.
Charles E. Craig, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Charles E. Craig, do surrender himself to the custody of the United States Marshal for the Eastern District of Arkansas, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

October 14, 1964.

Order entered in accordance with

Opinion: —

Robert C. Tucker
Clerk, U. S. Court of Appeals
for the Eights Circuit.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17554. September Term, 1964.

Charles E. Craig, Appellant,

vs.

United States of America

Appeal from the United States District Court for the Eastern District of Arkansas.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

November 5, 1964.